86-340

No.

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1986

LOCAL 710, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
Petitioner,

v.

JACK THOMSEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Under this Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), did the adoption of the six month statute of limitations, provided in §10(b) of the National Labor Relations Act, for use in hybrid §301/fair representation suits exclude that portion of the statute which states that the claim must be filed and served within six months?

PARTIES TO THE PROCEEDINGS

Local 710, International Brotherhood of Teamsters, Defendant-Petitioner.

Jack Thomsen, Plaintiff-Respondent.

United Parcel Service, Inc., Defendant.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No.

LOCAL 710, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Petitioner,

v.

JACK THOMSEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit is reproduced at pp. 3a-17a of the attached Appendix ("App."). The decision of the United

States District Court for the Southern District of Iowa is reported at 608 F.Supp. 1244 and is reproduced at App. 19a-29a.

JURISDICTION

The judgment and decision of the Court of Appeals (App. 1a-17a) were issued on May 30, 1986. A motion for extension of time to file petition for rehearing was denied (App. 18a). No petition for rehearing or rehearing en bank was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISION INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), provides in pertinent part as follows:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing

> of the charge with the [National Labor Relations] Board and the service of a copy thereof upon the person against whom such charge is made...

STATEMENT OF THE CASE

A. The Relevant Facts

Petitioner-Defendant Local 710, International Brotherhood of Teamsters ("Local 710") and Defendant United Parcel Service, Inc. ("UPS") are parties to a collective bargaining agreement, which governed the terms and conditions of employment for Plaintiff-Respondent Jack Thomsen ("Thomsen"). As alleged in his complaint, Thomsen was terminated from his employment with UPS on December 16, 1983 (App. 37a). Thomsen grieved the discharge and the matter was submitted to the contractually established Joint Grievance Committee, which heard the grievance on January 19, 1984

and upheld the discharge on the same date (App. 38a-39a).

Thomsen filed his complaint with the United States District Court for the Southern District of Iowa on June 18, 1984. He charged UPS with discharging him in violation of the collective agreement and he charged Local 710 with breach of the duty of fair representation in connection with the handling of his grievance (App. 35a-41a). Thomsen did not effectively serve the complaint and summons on Local 710 until August 1, 1984 (App. 5a-6a; 42a-43a).

B. The Proceedings Below

Jurisdiction over Thomsen's complaint was based on §301 of the Labor-Management Relations Act, 29 U.S.C. §185. After receiving the summonses and complaints, the defendants

filed motions to dismiss and/or quash. The District Court issued its Memorandum Opinion and Ruling on May 15, 1985 (App. 19a-29a). It treated the motion of Local 710 to dismiss as a motion for summary judgment and denied that motion. Specifically, it ruled that "[T]he service requirement contained in section 10(b)...is not applicable to a judicial action presenting a section 301-fair representation claim." (App. 27a)

The Opinion and Ruling of the District Court also contained a certification pursuant to 28 U.S.C. §1292(b). The District Court stated that the denial of Local 710's motion involved "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially

advance the ultimate termination of the litigation." (App. 27a-28a)

Local 710 applied to the United States Court of Appeals for the Eighth Circuit for permission to take an interlocutory appeal but that motion was denied as untimely on June 18, 1985 (App. 31a). The order denying the application stated that it was made "without prejudice to appellant's right to seek the entry of a fresh certification by the District Court, followed by a timely application to this Court." (App. 31a) Local 710 requested a fresh certification from the District Court and such a certification was issued on June 26, 1985 (App. 32a-34a). That certification noted that the untimeliness of the previous application to the Court of Appeals was because of the delay in

receipt of the ruling by primary counsel for Local 710 (App. 33a). Local 710 filed a renewed application for leave to take an interlocutory appeal pursuant to 28 U.S.C. §1292(b) and this application was granted by the Court of Appeals on July 11, 1985 (App. 30a).

Following briefing and oral argument, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court, Honorable William C. Hanson dissenting (App. 3a-17a).

REASONS FOR GRANTING THE WRIT

A. The Question Presented Here Has Divided the Courts of Appeals and This Court Has Granted a Writ of Certiorari in Another Case Which Raises the Question.

Since this Court's ruling in DelCostello v. International Brotherhood of Teamsters, the applicability of the filing and service requirement of §10(b) to suits of this sort has divided the courts of appeals. Three circuits have ruled that §10(b) applies in its entirety and that hybrid §301/fair representation suits therefore must be filed and served within six months of the alleged misconduct. Howard v. Lockheed-Georgia Co., 742 F.2d 612 (11th Cir. 1984); Simon v. Kroger Co., 743 F.2d 1544 (11th Cir. 1984), cert. denied, 105 S.Ct. 2155 (1985); Gallon v. Levin Metals Corp., 779 F.2d

1439 (9th Cir. 1986); West v. Conrail, 780 F.2d 361 (3rd Cir. 1985), cert. granted, 106 S.Ct. 3293 (1986). In addition to the Court of Appeals for the Eighth Circuit in the instant case, the contrary conclusion has also been reached by the Court of Appeals for the Sixth Circuit. Macon v. ITT Continental Baking Co., 779 F.2d 1166 (6th Cir. 1985). As noted, this Court has already granted a writ of certiorari in West v. Conrail.[1]

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[1] Because West v. Conrail arises under the Railway Labor Act, 45 U.S.C. §§151-188, it may be particularly desirable to grant the writ sought here so that the Court will have an opportunity to determine whether cases under that act and the Labor-Management Relations Act are to be treated consistently.

B. Utilization of the Filing and Service Requirement of §10(b) in Hybrid §301/Fair Representation Suits Is Consistent with Federal Labor Policy and with Prior Decisions Regarding the Commencement of Actions.

Because this Court has already granted a writ of certiorari to determine the issue presented here, and because of the division among the courts of appeals, Local 710 respectfully submits that a detailed argument in support of this petition is unnecessary. There are, however, important reasons why this petition should be granted and the decision below should be reversed.

1. Application of §10(b) in its entirety will serve the purposes underlying this Court's decision in DelCostello v. International Brotherhood of Teamsters.

Each of the considerations cited by this Court in DelCostello supports application of the limitations period of §10(b) in its entirety. The Court in DelCostello stated:

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case.... Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this.

462 U.S. at 171 (quoting United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 70-71 (1981) (Stewart, J. concurring)) (citations omitted).

Applying the limitations provisions of §10(b) in their entirety would advance both of the interests cited in DelCostello. First, it would assure

that whether a claimed breach of the duty of fair representation were pursued in court or before the National Labor Relations Board, the same limitations period would apply. See NLRB v. Local 264, Laborers' International Union of North America, 529 F.2d 778, 782 (8th Cir. 1976) ("The statute is clear in providing that a charge must not only be filed, it must also be served within the prescribed six month period."), quoted in Howard v. Lockheed-Georgia Co., 742 F.2d 612, 614 (11th Cir. 1984) (per curiam). To ignore this portion of §10(b) would permit an employee claiming a breach of the duty of fair representation to enlarge the limitations period by choosing to pursue his claim in court rather than before the National Labor Relations Board. Such a result is nei-

ther desirable nor consistent with "the need for uniformity" which was recognized in DelCostello and Mitchell.

Failure to adopt all aspects of §10(b) would also interfere with the balancing which was discussed in DelCostello. In adopting the six month limitations period, the Court determined that this amount of time would strike the proper balance between the employee's right to challenge what he believes is improper conduct and the right of the parties to a labor contract to assure a stable bargaining relationship and the finality of private settlements. 462 U.S. at 171. Ignoring the service requirement of §10(b) would give employees additional time within which to pursue their claims, thereby upsetting the balance which DelCostello found

to be both appropriate and consistent with the intent of Congress.

2. Application of §10(b) in its entirety would be consistent with prior treatment of statutes requiring something more than filing a complaint to commence an action.

Finally, adoption of §10(b) in its entirety would be consistent with prior decisions involving statutes which require some action beyond filing the complaint in order to commence the action. In Matles v. United States, 356 U.S. 256 (1958) (per curiam), the government had failed to follow the requirement of 8 U.S.C. §1451(a) that an affidavit of good cause be filed with the complaint in order to institute denaturalization proceedings. The Court ruled that the subsequent filing of the affidavit was insufficient and that the complaint must be dismissed. Id. at

257. See 2 Moore's Federal Practice ¶3.04, p. 3-21 (2nd Ed. 1985).

Similarly, in Walker v. Armco Steel Corp., 446 U.S. 740 (1980), a diversity case, the Court ruled that the action was barred by the state statute of limitations, which required filing and service within a prescribed period. Although Fed.R.Civ.P. 3 states that an action is commenced merely by filing the complaint, the Court found that the state statute controlled and that mere filing did not toll the statute of limitations.

Section 10(b) requires filing and service within six months and there is no reason that one part of that statute should be ignored.

CONCLUSION

For the foregoing reasons, Local 710 respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 85-1830SI	*	
	*	
Jack Thomsen,	*	
	*	
Appellee,	*	
	*	Appeal from the
v.	*	United States
	*	District Court
United Parcel	*	for the Southern
Service, Inc.,	*	District of Iowa
et. al.,	*	
	*	
Appellant.	*	

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion

of this Court.

May 30, 1986

A true copy.

ATTEST: /s/ Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

7/2/86

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1830

Jack Thomsen, Appellee,	*	
v.	*	Appeal from the United States District Court for the Southern District of Iowa.
United Parcel Service Inc., Local 710, International Brotherhood of Teamsters, Appellant,	*	

Submitted: February 13, 1986

Filed: May 30, 1986

Before HEANEY and BOWMAN, Circuit Judges, and HANSON,* Senior District Judge.

HEANEY, Circuit Judge.

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*The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

Local 710, International Brotherhood of Teamsters (Union) appeals from a district court order denying its motion for summary judgment.

I. BACKGROUND

On December 16, 1983, United Parcel Service (UPS) discharged Jack Thomsen. On January 19, 1984, Thomsen filed a grievance protesting his discharge with a joint Union/UPS committee, which, after a hearing, upheld the discharge. Thomsen filed a complaint in district court on June 18, 1984, claiming that UPS had discharged him in violation of the collective bargaining agreement and section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and that the Union had breached its duty of fair representation in the ensuing grievance proceedings in violation of the National Labor Relations Act.

The Union sought dismissal of the action on the ground that it was barred under section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b),[1] which requires that a fair representation action be filed and served within six months of the accrual of the cause of action. Although Thomsen had filed his

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[1] 29 U.S.C. § 160(b) provides in pertinent part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board * * *, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * * .

action within the six-month limit, he had not effectively served the defendants until August 1, 1984, after six months had elapsed.[2] On May 15, 1985, the district court denied the Union's motion, finding that the six-month statute of limitations had been tolled at the time of filing, and that the action was therefore timely. It then certified the matter to this Court pursuant to 28 U.S.C. § 1292(b).

II. DISCUSSION

Although there is no statute of lim-

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[2] Thomsen, proceeding pro se, failed in his initial attempts to serve UPS and the Union. The defendants apparently were able to quash the summonses on the bases of improper delivery, delivery to persons unable to accept service, the naming of the wrong Union official, and omission of certain information. Thomsen then obtained counsel, who properly served defendants.

itations expressly applicable to hybrid section 301/fair representation cases, in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), the Supreme Court found that section 10(b) of the National Labor Relations Act was "designed to accommodate a balance of interests very similar to that at stake here," id. at 169, and "borrowed" section 10(b)'s statute of limitations for the hybrid actions. The question remains, however, whether section 10(b)'s six-month service requirement is also applicable to the hybrid cases.

We recognize that this issue has produced a split among several of the Circuits of the United States Courts of Appeals. The district court found that, in a hybrid section 301/fair representa-

tion complaint, the six-month statute of limitations is tolled by the filing of the complaint, and the plaintiff need not effect service within six months of the accrual of the cause of action. Subsequent to the district court's decision, the Sixth Circuit adopted the same approach,[3] also finding it consistent with DelCostello. See Macon v. ITT Continental Baking Co., 779 F.2d 1166

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[3] This approach is similar to that taken by federal courts in section 1983 actions, where limitation periods are borrowed from state statutes. Macon v. ITT Continental Baking Co., 779 F.2d 1166, 1171-72 (6th Cir. 1985).

> While state law controls the time within which an action must be begun, the manner in which an action is commenced and when it is deemed to have begun, are governed by the law of the forum. These matters are procedural and not substantive.

Id. at 1172 (quoting Mohler v. Miller, 235 F.2d 153, 155 (6th Cir. 1956)).

(6th Cir. 1985). Although there is also support for the Union's argument that, under DelCostello, the limitations period in these hybrid actions is not tolled until the complaint has been both filed and served, see Gallon v. Levin Metals Corp., 779 F.2d 1439 (9th Cir. 1986); West v. Conrail, a Foreign Corp., 780 F.2d 361 (3d Cir. 1985); Howard v. Lockheed-Georgia Co., 742 F.2d 612 (11th Cir. 1984), we are persuaded that the resolution of this issue by the district court is more consistent with the policies of federal labor law and the practicalities of this type of litigation.

The DelCostello Court focused on the fact that section 10(b) established a "6-month period for making charges of unfair labor practices to the NLRB," see id., and did not address the service

question. There was, however, no need for it to do so. The Court made it very clear that it was borrowing the limitations period from section 10(b) to fill a gap in federal law. There is no gap in federal law in regard to service requirements. As the district court stated, "[i]n federal suits to enforce federal rights, the general rule is that limitation periods are tolled by the filing of a complaint. See Fed. R. Civ. P. 3." In Moore Co. v. Sid Richardson Carbon & Gasoline Co., 347 F.2d 921 (8th Cir. 1965), cert. denied, 383 U.S. 925, reh'g denied, 384 U.S. 914 (1966), this Court held that

> in a case such as this, based upon federal law and controlled by federal statute of limitation, * * * the commencement of the action in and of itself is sufficient to toll the statute. Federal Rule of Civil Procedure 3 reads: "A civil action is commenced by filing a complaint with the court." Such rule in

> our view unmistakedly states in plain, clear, well-understood and unambiguous language that an action is commenced by filing the complaint. The rule sets forth no additional requirements or conditions. The history of the promulgation of the rule is set out by Judge Medina in Messenger v. United States. As there shown, suggestions were made that the action abate if jurisdiction by service of process was not obtained within sixty days. Judge Medina in viewing the history of the rule, states:
>
> "In the end, however, no time was specified for the service of process, the Advisory Committee noting that the motion sanctioned by Rule 41(b) provided 'a method available to attack unreasonable delay in prosecuting an action after it has been commenced.' See Report of the Advisory Committee Containing Proposed Rules of Civil Procedure, p. 4 (April, 1937)."
>
> It appears to us that Rule 41(b) provides adequate protection against unreasonable delay in serving process or in prosecuting the suit.

Moore Co., 347 F.2d at 922-23 (citations omitted).

The Sixth Circuit emphasized that

> [t]he tolling provision of section 10(b) was designed for administrative proceedings and is inappropriate in the federal judicial context. Indeed, it has long been recognized that Congress created the administrative courts system with quite different concerns from those which necessarily governed Article III courts. The service requirement of section 10(b) is necessary in NLRB proceedings because without it there would be no rule at all. In the federal courts, however, Fed. R. Civ. P. 4(a) orders the clerk of court to "forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint," and Fed. R. Civ. P. 4(j) requires such service to be made within 120 days.

Macon, 779 F.2d at 1171 (citations omitted).

Besides being totally unnecessary, the use of section 10(b)'s service requirement in the federal courts would cause confusion. Id. In fact, the

Advisory Committee on Rules intended Rule 4(a) to avoid just such interpretation questions as have arisen here.

> When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirements of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

Fed. R. Civ. P. 4(a) advisory committee note.

The desirability of uniformity in the application of the Federal Rules of

Civil Procedure provides a persuasive argument for rejecting the application of section 10(b)'s service requirement in these judicial actions.

Although there was no need for the DelCostello Court to consider the service question, we are convinced that, had it done so, it would have rejected the requirement. One of the Court's main concerns had been that the plaintiff be provided "with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." See DelCostello, 462 U.S. at 166. It emphasized that

> [i]n the labor setting, * * * the employee will often be unsophisticated in collective-bargaining matters, and he will almost always be represented solely by the union. He is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in

> the arbitration proceeding, and to frame his suit.

Id., at 165-66.

According to the Federal Rules of Civil Procedure, service is considered "prompt" if made within 120 days of the filing of the complaint. Simple arithmetic demonstrates that, in order to have a reasonable amount of time to make prompt service and still meet the six-month (approximately 180 days) service requirement, the plaintiff would have to file the complaint within sixty days of the accrual of the cause of action. The Supreme Court could not have intended this result, as, in DelCostello, it determined that a ninety-day filing requirement did not provide plaintiffs with sufficient opportunity to vindicate their rights. See DelCostello, 462 U.S.

at 166. The Supreme Court would not have "borrowed" a service requirement which would have denied the Rule 4(j) 120-day grace period to those very plaintiffs it sought to protect from harsh filing deadlines.

Accordingly, we affirm the order of the district court.

HANSON, Senior District Judge, dissenting.

Although the majority opinion arrives at an eminently sensible analysis of the application of section 10(b)'s service requirement, I do not believe that DelCostello leaves us room to so speculate. It is apparent to me that the Supreme Court recognized the unambiguous requirement in section 10(b) that filing and service be accomplished within six

months of the accrual of the action by its specific reference to this language in the statute. DelCostello v. Teamsters, 452 U.S. 151, 154 n.2 (1983). To construe otherwise places this Court in the untenable position of legislating what is the appropriate policy in this area.

I must therefore respectfully dissent in this case and in Ramon Elisalde v. International Association of Machinists, et al., No. 85-2025 (8th Cir. filed May 30, 1986).

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1830

Jack Thomsen, Appellee,	*	
vs.	*	Appeal from the United States
Local 710, International Brotherhood of Teamsters, Appellant.	*	District Court for the Southern District of Iowa

The Clerk is directed to file the motion for extension of time to file petition for rehearing, submitted untimely by appellant. The motion has been considered by the Court and is denied.

June 25, 1986

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JACK THOMSEN,	*	
	*	
Plaintiff,	*	
	*	
v.	*	CIVIL NO. 84-113-D-2
	*	
UNITED PARCEL SERVICE, INC.; and LOCAL 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	*	MEMORANDUM OPINION AND RULING ON MOTION FOR SUMMARY JUDGMENT
	*	
Defendants.	*	

The court has before it a motion for summary judgment submitted by defendant Local 710, International Brotherhood of Teamsters.[1] Plaintiff has filed a resistance to the motion and the matter is fully submitted.

This action is brought under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Plaintiff claims that defendant United

Parcel Service, Inc. discharged him in violation of the collective bargaining agreement governing his employment and that his union, defendant Local 710, breached its duty of fair representation in the ensuing grievance proceedings.

In support of its motion, the union contends that plaintiff's suit is barred by the six month limitations period applicable to hybrid section 301-fair representation claims under DelCostello v. International Brotherhood of Teamsters, 103 S.Ct. 2281 (1983). The union's first basis for this contention is that "the newly filed complaint was not filed until September 17, 1984." This contention is not supported by the facts. There is no "newly filed complaint." New summonses were issued by the clerk of court on September 17,

1984, but the only complaint on file is the original complaint filed June 18, 1984, which is within six months of January 19, 1984, the date plaintiff's claim arose.

The union's second basis for its contention that plaintiff's suit is time barred is that the union was not served within the six month limitations period. In federal suits to enforce federal rights, the general rule is that limitations periods are tolled by the filing of a complaint. See Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1056 (1969). However, the union argues that under the rule of DelCostello the six month limitations period is not tolled until the plaintiff

has both filed and served his complaint. This is the conclusion reached by two panels of the United States Court of Appeals for the Eleventh Circuit. Simon v. Kroger Co., 743 F.2d 1544 (11th Cir. 1984), cert. denied, 53 U.S.L.W. 3772 (U.S. April 30, 1985); Howard v. Lockheed-Georgia Co., 742 F.2d 612 (11th Cir. 1984).

This court respectfully disagrees with the determinations of the Eleventh Circuit. In DelCostello, the Court borrowed the six month limitations period provided in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), for making charges of unfair labor practices to the National Labor Relations Board. Section 10(b) provides that its limitation period is not tolled until a charge is filed with the Board

and served on the employer. The Court did not state whether it was borrowing the tolling provision of section 10(b) along with its limitations period. However, the analysis in which the Court engaged gives no indication that its purpose extended beyond discovery of the appropriate length of time within which to commence a hybrid section 301-fair representation action: "[W]e are applying a statute of limitations to a different cause of action . . . because it is the most suitable source for borrowing to fill a gap in federal law." DelCostello, 103 S.Ct. at 2293 n. 21. The "gap" existed because the duty of fair representation claim was created by judicial interpretations of the National Labor Relations Act; the section 10(b) limitations period for bringing unfair

labor practice charges was selected simply because it provides "a closer analogy than available state statutes" to a fair representation claim. DelCostello, 103 S.Ct. at 2294.

This court recognizes that limitations periods and tolling provisions are closely related. However, that is not a sufficient reason to deviate from the general rule that in a federal suit to enforce a federal right, the filing of a complaint tolls the limitations period. Following the general rule promotes uniformity among suits brought in federal court. Moreover, the tolling provision of section 10(b) was designed for administrative proceedings. Requiring service to toll the limitations period is not necessary in suits in federal courts because of Rule 4(a),

Fed. R. Civ.P., which provides that "[u]pon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint." Another consideration that weighs against adoption of the section 10(b) service requirement is the rule followed when a state limitations period is borrowed for a federal cause of action: tolling upon filing applies even if the state's law requires service on the defendant to toll its limitations period. Jackson v. Duke, 259 F.2d 3, 6 (5th Cir. 1958); Bomar v. Keyes, 162 F.2d 136 (2d Cir.), cert. denied, 332 U.S. 825 (1947); 2 J. Moore & J. Lucas, Moore's Federal Practice, ¶ 3.07 [4.-3-2] (2d ed. 1985).

In a dissent from the denial of certiorari in Simon v. Kroger Co., Justice White, joined by Justices Brennan and Marshall, notes another reason for rejecting the service requirement of section 10(b):

> In practical effect, the Eleventh Circuit's ruling shortens the 6-month period by the amount of time necessary of [sic] effect service under the Federal Rules. Section 10(b) does not have a similar impact in administrative proceedings, in which service is accomplished merely by placing a copy of the charge in the mail. Compare Fed. Rule Civ. Proc. 4 with 29 CFR § 102.113(a) (1984).

Simon v. Kroger Co., 53 U.S.L.W. at 3773. The dissenters also observe that the adoption of the section 10(b) tolling provision to hybrid actions was implicitly rejected in Smith v. General Motors Corp., 747 F.2d 372 (6th Cir.

1984), and Williams v. E.I. du Pont de Nemours Co., 581 F. Supp. 791 (M.D. Tenn. 1983).

This court concludes that the service requirement contained in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), is not applicable to a judicial action presenting a section 301-fair representation claim. Plaintiff commenced this action within the six month limitation period when he filed his complaint. Fed. R. Civ. P. 3. Therefore, the motion for summary judgment is denied.

The court is of the opinion that this order denying defendant Local 710's motion to dismiss involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate

appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

DATED this 15th day of May, 1985.

/s/Harold D. Vietor
HAROLD D. VIETOR, Chief Judge
Southern District of Iowa

FOOTNOTE

[1]In its order dated February 27, 1985, the court ordered that defendant's motion to dismiss be treated as one for summary judgment. Plaintiff's subsequently filed resistance incorporates his resistance to the motion to dismiss.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1830SI
(formerly Misc. 85-8031)

Jack Thomsen, Appellee,	*	
vs.	*	Appeal from the United States District Court for the Southern District of Iowa
Local 710, International Brotherhood of Teamsters, Appellant.	*	

On consideration of petitioner's renewed application for leave to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), it is ordered that the application be granted. The Clerk will regularly docket the appeal.

July 11, 1985

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Misc 85-8031 September Term, 1984

Jack Thomsen,	)	
	)	
Respondent,	)	
	)	
vs.	)	
	)	
United Parcel Service, Inc.,	)	O R D E R
	)	
Local 710, International Brotherhood of Teamsters,	)	
	)	
Petitioner.	)	
	)	

The application for permission to take an interlocutory appeal under 28 U.S.C. § 1292(b) is denied because it was not filed in this Court within ten days of the District Court's order making the § 1292(b) certification. This action is without prejudice to appellant's right to seek the entry of a fresh certification by the District Court, followed by a timely application to this Court.

June 18, 1985

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JACK THOMSEN,	*	
	*	
Plaintiff,	*	
	*	
v.	*	CIVIL NO. 84-113-D-2
	*	
UNITED PARCEL SERVICE, INC., and LOCAL 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	*	CERTIFICATION FOR APPEAL
	*	
Defendants.	*	

On May 15, 1985, this court entered its memorandum opinion and ruling denying the motion for summary judgment filed by defendant Local 710, International Brotherhood of Teamsters. As part of that ruling the court certified the judgment for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Defendant Local 710 applied to the United States Court of Appeals for the Eighth Circuit for permission to take an interlocutory appeal. The application

was denied because it was untimely. The untimeliness apparently was the result of delay in the receipt of this court's ruling by Chicago counsel for defendant Local 710.

On June 18, 1985, the court of appeals entered the following order:

> The application for permission to take an interlocutory appeal under 28 U.S.C. § 1292(b) is denied because it was not filed in this Court within ten days of the District Court's order making the § 1292(b) certification. This action is without prejudice to appellant's right to seek the entry of a fresh certification by the District Court, following by a timely application to this Court.

Defendant Local 710 has requested the issuance of a fresh certification. That request is granted.

The court is of the opinion that its order of May 15, 1985, denying defendant Local 710's motion for summary judgment involves a controlling question

of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

DATED this 26th day of June, 1985.

/s/Harold D. Vietor
HAROLD D. VIETOR, Chief
Judge
Southern District of Iowa

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

JACK THOMSEN,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
UNITED PARCEL	)	
SERVICE, INC., and	)	JURY DEMAND
LOCAL 710, INTER-	)	
NATIONAL BROTHERHOOD	)	
OF TEAMSTERS,	)	
	)	
Defendant.	)	

PRO SE COMPLAINT

Plaintiff, Jack Thomsen, for his pro se complaint states as follows:

1. This action is brought under section 301 of the Labor Management Relations Act, 29 U.S.C. §185; 28 U.S.C. §1331 and 28 U.S.C. §1337.

2. This action is brought to obtain my reinstatement to employment at United Parcel Service (U.P.S.), with all benefits, back pay and other relief due resulting from my unlawful discharge from U.P.S. on December 16, 1983.

3. I am a citizen of the United States and a resident of Long Grove, Iowa. I was employed by U.P.S. as a feeder driver since May 2, 1977 until my discharge on December 16, 1983.

4. During my employment at U.P.S. I was a member in good standing of Local 710 of the International Brotherhood of Teamsters, Highway Drivers, Dockmen, Spotters, Rampmen, Meat, Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees.

5. Local 710 is a labor organization representing employees in interstate commerce, as defined in 29 U.S.C. §151. Local 710 maintains its principle headquarters at 4217 South Halsted Street, Chicago, Illinois 60609.

6. United Parcel Service is a corporation which conducts business in Iowa and other states.

7. During my employment, I was covered by a labor contract entered into between U.P.S., Inc. and Local 710. The contract was in effect from May 1, 1982 through June 1, 1985.

8. On December 16, 1983, I was wrongfully terminated for allegedly having a third avoidable accident within a twelve month period. The accident occurred when I was parking the vehicle at a rest stop. My right front tire dropped into a hole which was covered with snow and which I could not see. This accident resulted in cracking a side view mirror of the vehicle parked to my right. The total amount of damage caused was about $19.95, for a replacement mirror.

9. I was also charged with an avoidable auto accident in April, 1983 by my feeder supervisor Gloria Winterlin. This accident was not avoidable.

10. Article 16 of my contract is attached and provides that an employee may be discharged for three avoidable accidents within a twelve month period. My contract only permits discharges for just cause.

11. My termination was in violation of Article 16 of the contract because it was not for cause and due to the fact that I did not have three avoidable accidents within a twelve month period.

12. My discharge was also unfair because it was due in part to discrimination by U.P.S. as a result of my previous complaints and grievances and because of their hostility to me for my affiliation with the Teamsters for a Democratic Union, a rank and file dissident organization within the Teamsters Union.

13. A grievance to protest my termination was heard by a Local 710 and

U.P.S. grievance committee in Chicago on January 19, 1984. The grievance panel found that the discharge was proper. The grievance was denied for reasons which are not fully known by me at this time.

14. My union representatives failed to adequately represent me at my hearing. They engaged in arbitrary, discriminatory and bad faith representation of my interests for reasons not fully known to me at this time. I believe that the union did not secure my reinstatement, in part due to their hostility towards me due to my affiliation with the Teamsters for a Democratic Union.

15. My union representatives failed to adequately investigate this grievance or to prepare for the hearing. The union permitted me to be discharged without just cause and contrary to Article 16 of the contract.

16. Local 710 has failed to adequately represent me in the past con-

cerning grievances, including my two prior chargeable accidents.

17. My hearing before the grievance committee on January 19, 1984, was not fair because the panel was not neutral and no evidence was submitted that I had engaged in an avoidable accident.

18. The union has refused to reopen my grievance or to process it for further review. I have attempted to secure additional relief through union channels but have been unsuccessful. I believe that further exhaustion of union remedies would be futile and would not result in the re-opening of my grievance or my reinstatement.

WHEREFORE, I ask that this Court:

(1) Restore me to my position as a feeder driver at United Parcel Service;

(2) Award me damages for all back pay, fringe benefits and other losses which I have suffered;

(3) Award me any other relief which I am entitled to;

(4) Appoint an attorney to represent me in the event I have not secured counsel within ninety (90) days of the filing of this action.

Respectfully submitted,

/s/Jack C. Thomsen
Jack Thomsen
R.R. 2 Box 77
Long Grove, Iowa 52756
(319) 285-4674

Pro Se Plaintiff

/s/HENRY D. FARBER
Notary Public

State of Illinois)
)
County of Cook)

AFFIDAVIT

Now comes JOHN O'CONNOR who being duly sworn deposes and says:

1. I am the controller for Local 710, International Brotherhood of Teamsters.

2. Local 710 is a Defendant in the case of Thomsen v. United Parcel Service, Inc. and Local 710, I.B.T., No. 84-113-D-2 (S.D. IA.).

3. Local 710 received, through the mail, a copy of a pro se Complaint in this matter on August 1, 1984. I have direct personal knowledge of the receipt of the Complaint on that date.

4. Further, affiant sayeth not.

/s/John O'Connor
JOHN O'CONNOR

Subscribed and sworn to before me
this 1st day of November, 1984.

/s/ Jean M. Tenas
Notary Public
My Commission Expires Mar.27,1988

FILED
SEP 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-340 (2)

IN THE
Supreme Court of the United States
October Term, 1986

LOCAL 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

v.

JACK THOMSEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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September 1986

CASILLAS PRESS INC. - 1717 K Street NW Washington DC - 223-1220

6 pp

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In The
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October Term, 1986

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LOCAL 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

v.

JACK THOMSEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT

This is a "hybrid action" by a member of the International Brotherhood of Teamsters against both his employer, United Parcel Service ("UPS"), alleging that he was fired in breach of contract, and his union, petitioner Teamsters Local 710, alleging that it colluded with management to uphold his discharge in violation of the duty of fair representation ("DFR"). In brief, respondent's claim is that his discharge was contrary to the "just cause" requirement of the contract, that the union's representation of his interests in the joint grievance committee was arbitrary, discriminatory, and in bad faith, and that the union's misconduct was motivated in part by the fact that

Thomsen is affiliated with Teamsters for a Democratic Union, a Teamsters rank-and-file dissident organization.

Proceeding *pro se*, Thomsen filed a complaint in the United States District Court for the Southern District of Iowa against both UPS and Local 710 on June 18, 1984, well within the six month period after the grievance procedure was completed on January 19, 1984. Thomsen completed the summons forms by hand and delivered one of them to the Scott County sheriff for service on UPS at its terminal in Davenport. Service was made on the company's "feeder manager" on July 12, 1984, which was also within the six-month period. UPS then moved to quash the summons on the grounds that the summons was defective on its face and that service could not be obtained by delivery to a feeder manager.

Respondent's efforts to obtain service of Local 710 encountered even greater obstacles. Local 710, which represents employees throughout Indiana, Illinois, and Iowa, has its office in Chicago. Thomsen first tried to have the complaint served by the sheriff of Cook County, Illinois, but service was refused, apparently because Thomsen had indicated the name of the wrong Local 710 official to accept service. Next, Thomsen mailed the complaint to the union's office in Chicago where, according to the affidavit of a Local 710 officer, it was received on August 1, 1984. Local 710 then moved to quash service or dismiss on the grounds that certain information was omitted from the summons and that mailing a summons is insufficient, under Rule 4(d)(3), F. R. Civ. P., to effect service on an unincorporated association.

At this point Thomsen obtained counsel, who obtained new summonses and caused them to be served on both defendants in the proper manner; accordingly, the district court denied the motions of each defendant to quash service as moot. UPS then filed its answer. Local 710, however, moved to dismiss the complaint or, in the alternative, for summary judgment, on the ground that it had not received the complaint until more than six months from the conclusion of the grievance procedure. The district court denied the motion, but certified the appeal for

interlocutory appeal under 28 U.S.C. § 1292(b). 608 F. Supp. 1244 (S.D. Iowa 1985). Defendants moved for leave to appeal after the expiration of the ten-day period allowed by section 1292(b), and the Court of Appeals denied leave to appeal without prejudice to recertification of the question. The district court promptly recertified the question and the court of appeals accepted the appeal. The decision of the district court was affirmed. 792 F.2d 115 (8th Cir. 1986).

ARGUMENT

IF THE COURT HAS JURISDICTION OF THE PETITION, IT SHOULD HOLD THIS CASE FOR DISPOSITION IN LIGHT OF *WEST V. CONRAIL*, NO. 85-1804, WHICH RAISES THE IDENTICAL ISSUE.

1. There is some question about whether the Court has jurisdiction of the petition for a writ of certiorari, based on questions about the jurisdiction of the Court of Appeals to hear the interlocutory appeal. Some courts take the position that, absent some substantial reconsideration of the merits of a certified question, an issue may not simply be recertified when the appellant fails to perfect a timely appeal. *E.g., Nakhleh v. Chemical Constr. Corp.*, 366 F. Supp. 1221 (S.D.N.Y. 1973), *and cases cited.* On the other hand, this Court may have indicated a contrary view by assuming jurisdiction without explicit discussion of the issue in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984). We note that the dissenters did discuss the issue, and decided that jurisdiction existed. *Id.* at 160-162. If the Court concludes that jurisdiction is lacking, it should dismiss the petition.

2. If the Court concludes that it does have jurisdiction, then it should hold the petition for disposition in light of *West v. Conrail*, No. 85-1804, which raises an issue identical to the question presented here. Petitioner urges that certiorari be granted

because *West* arises under the Railway Labor Act, whereas respondent's claim is based on the Labor-Management Relations Act ("LMRA"). Petition at 9 n.1. However, *West* is being litigated on the assumption that the same rules apply to both kinds of fair representation cases, and so there is no reason to grant the petition here in order to be certain that the issue will be resolved as it applies to the LMRA as well as the RLA.

CONCLUSION

The petition should either be dismissed for lack of jurisdiction, or held for disposition in light of *West v. Conrail*, No. 85-1804.

Respectfully submitted,

Paul Alan Levy
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